FILE COPY

FILED
MAY 25 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1506

MARTIN WHITCOMB, ET AL.,
Petitioners,

v.

THE SANITARY COMMISSION OF ANNE ARUNDEL COUNTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JOSEPH W. ALTON and FRANK J. RICE IN OPPOSITION

PHILLIP F. SCHOTZ,
County Solicitor,
JOHN M. COURT,
Assistant County Solicitor,
Anne Arundel County, Maryland,
Arundel Center Building,
Annapolis, Maryland 21404,
Attorneys for Respondents.

The Daily Record Co., Baltimore, Md. 21203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1506

MARTIN WHITCOMB, ET AL.,
Petitioners,

v.

THE SANITARY COMMISSION OF ANNE ARUNDEL COUNTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR JOSEPH W. ALTON and FRANK J. RICE IN OPPOSITION

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The allegation in petitioners' first "question", that the Court of Appeals "abused its discretion in refusing to grant a meaningful hearing", appears on the record to be so presumptuous as not to warrant comment here. Plainly but one issue has been considered below and that may be simply stated as follows:

Does the Complaint, as amplified in response to the Motion for More Definite Statement, properly state a cause of action against the Defendants which is within the jurisdiction of the District Court?

STATEMENT OF THE CASE

The central question here is whether a landowner aggrieved by the construction of a public facility near his lands can collaterally attack the same in Federal District Court through public officers of the municipality involved, under the Civil Rights Act, for carrying out the project therefor after it has been authorized by the local government and upheld in a state court determination in which the landowner participated. The District Court dismissed this action on motion of the Defendants, Respondents here, primarily on the ground that the deprivation of property rights is not protected under the Civil Rights Statute.

The complaint here in controversy has been brought in District Court by Maryland residents (I.R. 3-11, 17, 18) against two individuals, Respondents here, who are alleged to be administrative officers of a Maryland county. Federal jurisdiction was there invoked under 28 U.S.C. 1343, 42 U.S.C. 1983 (Civil Rights Act) and the Fifth and Fourteenth Amendments to the Federal Constitution. The substance of the purported cause of action appears to be that Joseph Alton, as County Executive, and Frank Rice, as Superintendent of the County's Department of Public Works, violated the civil and constitutional rights of the Complainants "by authorizing, superintending and overseeing the construction of the sewage plant" complained of, in that (when constructed) the said plant:

a. will decrease the fair market value of Plaintiffs' real property in the same vicinity by an amount in excess of $10,000.00,

b. will deny or interfere with Plaintiffs' alleged civil or constitutional rights to peaceful enjoyment of their property,

c. will deny or interfere with Plaintiffs' alleged civil or constitutional rights to breathe "clean air" and to enjoy an unpolluted environment.

Further the complaint alleges that the individual Defendants:

d. failed to follow procedures prescribed in local law in determining the location of the proposed sewage disposal plant,

e. failed to provide a proper design of plant,

f. failed to honestly explain the plant proposal to the public and to comply with "warranties" alleged to have been given in arranging for the financing for the project.

The relief demanded is:

(1) a declaration "that the proceedings heretofore had concerning the construction of a sewage disposal plant" are null and void;

(2) that mandamus issue requiring Defendants to "cancel all contracts for construction" of said plant, and

(3) that Defendants be enjoined from continuing to construct a sewage plant in the proposed location.

The District Court granted the Defendants' Motion to Dismiss the Complaint, as amplified, on the grounds asserted in the Motion, i.e., that it had no jurisdiction of the controversy either in the official capacity of the Defendants as agents of Anne Arundel County, or, in their individual capacity, as residents of Maryland. The District Court's oral explanation (I.R. 40, 41) of its ruling stresses that the alleged deprivation relates to property rights only and it distinguishes the same from those personal rights protected by the federal law invoked for jurisdictional purposes. The Court of Appeals affirmed summarily *after* consideration of memoranda from counsel anent the motions and *after* receipt of printed briefs on the merits.

ARGUMENT

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST THE DEFENDANTS WHICH IS WITHIN THE JURISDICTION OF THE COURT BELOW.

The Complaint as drawn (I.R. 3-11, 17, 18) reveals that the real targets in this litigation are not the individual Defendants who are party to the suit, but rather the State of Maryland and its subdivision, Anne Arundel County. These governmental bodies are not party to the suit and appear to have been omitted in order to bring the action within the ambit of the Civil Rights Statute, 42 U.S.C. § 1983, which is applicable only to "persons". *Monroe v. Pape*, 365 U.S. 167, 188-191; *Sires v. Cole*, 320 F. 2d 877; *Hawley v. Sadler*, 331 F. 2d 387.

The relationship of the respondents, as individuals, to the central controversy here appears merely incidental and passive. It should be noted that the damages which the Appellants alleged in their complaint were prospective only and not actual. Further, since the individual respondents are not parties to the contract sought to be voided, the relief demanded is non-sequitur and entirely beyond the scope of the suit. One might, with equal logic, attempt to sue the Commandant of Marines in order to enjoin prosecution of the war in Viet Nam; in short, the objective may be admirable and the grievance real, but the legal remedy attempted is inadequate, extraneous and implausible, and no proper cause of action has been stated against the respondents here.

The District Court efficiently disposed (I.R. 34, 35) of the "personal liberty" concept advanced by the Appellant as his "main thrust argument". We will not attempt here to embellish that reasoning but move on to the other grounds advanced for remand.

Throughout the original Complaint, there appears the inference that the Appellant was denied justice in administrative and judicial proceedings in the State of Maryland and so has no recourse other than in Federal Court on federal grounds yet no appeal was prosecuted from those proceedings through the State Courts, and no attempt appears to have been made even to identify the supposed constitutional issues in that forum. Respondents submit that the Appellant had his day in Court and failed to avail himself of it. *Bennett v. Commissioner of Internal Revenue,* 113 F. 2d 837, 130 A.L.R. 369. We think the District Court (I.R. 33, 34) misapprehended *England v. Medical Examiners,* 375 U.S. 411, and call the attention of this Court to the language at page 418 thereof, where it is stated:

> "On oral argument in the instant case, we were advised that appellants' submission of their federal claims to the state courts had been motivated primarily by a belief that Windsor* required this. The District Court likewise thought that under Windsor a party is required to litigate his federal question in the state courts and 'dare not restrict his state court case to local law issues.' 194 F. Supp., at 522. Others have read Windsor the same way. It should not be so read. The case does not mean that a party must litigate his federal claims in the state courts, *but only that he must inform those courts what his federal claims are, so that the state statute may be construed 'in light of' those claims.* See Note, 73 Harv. L. Rev. 1358, 1364-1365 (1960)."

In the *England* case, the issue was whether to remand the case to the State Court for an interpretation of constitutional issues, as the District Court had attemped to do, and the majority opinion was that it was not necessary, and that if the complaint had been *originally* filed with

---

* *Employees Organizing Comm. v. Windsor,* 347 U.S. 901 (affirming 116 F. Supp. 354) (N.D. Ala. 1953).

the Federal Court (as it had) it could be pursued there. Here the question of the location of the disposal plant was originally litigated in the Maryland Courts, and there lost and abandoned without mention of constitutional issues. We assert that it would be a grievous distortion of public policy now to entertain a collateral attack on those proceedings, *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522 at 525.

The petitioners allege deprivation of "environmental rights" in their brief (pp. 14-17) and attempt to support the existence of this right, citing *DDB Realty Co. v. Merrill*, 232 F. Supp. 629, which deals with "freedom of association". We fail to perceive, after study of that case, how it is in point in the alleged controversy here; there is no allegation whatever that the respondents have interfered with the petitioners "freedom of association."

Petitioners next attempt to persaude the Court that the mere construction of a sewage disposal plant, per se, is a denial of equal protection to the inhabitants of the area in which it is situated. No authority is cited for this novel conclusion of law. Respondents submit that the "equal protection" argument in petitioners' brief is not consistent with the allegations of his complaint, paragraphs 9 and 13 (I.R. 5, 6), and appears to raise a purely conjectural issue. As stated in *Gully v. First National Bank*, 299 U.S. 109, at 117 and 118, 57 S. Ct. 96, 81 L. Ed. 70 (1936) and cited with approval in *Ream v. Handley*, 359 F. 2d 728, at 730 (1966):

> "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67, 68. To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-

BLEED THROUGH POOR COPY

sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. *Bird v. St. Paul F. & M. Insurance Co.*, 224 N.Y. 47, 51, 120 N.E. 86; *Leyland Shipping Co. v. Norwich Fire Insurance Society* (1918), A.C. 350, 369; *Insurance Co. v. Boon*, 95 U.S. 117, 130; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 474. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other one aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by."

Again in those parts of the petitioners' Brief styled "Bad Faith", citing *Egan v. City of Aurora*, 174 F. Supp. 794 (affirmed in 275 F. 2d 377) an attempt is made to raise an issue of wilful conspiracy to "extort" not evident on the face of the pleadings. We submit that the inference is not sustained by the case cited in any sense and that the whole fragile contrivance of the petitioners to make this controversy a federal case at this juncture appears so remote from the real issue that the language from *Gully, supra*, disposes of it as beyond the reasonable consideration of this Court.

In *U. S. v. Causby*, 328 U.S. 266, a case which more closely approximates, in general situation, the problem here than any of the others, the Court of Claims had granted a landowner damages by reason of government aircraft flights over his property which diminished the

value of his property. The case was reversed and remanded to require the trial court to spell out the nature of the easement which the United States had acquired through the payment of damages. In the instant case, it should be noted that no prayer for damages has been made and the taking of no specific easement is alleged.

We would call particular attention to the case of *Bottone v. Lindsley*, 170 F. 2d 708 at 709, Cert. denied, 336 U.S. 994, 69 S. Ct. 810, 93 L. Ed. 1101, cited with approval in *Sarelas v. Sheehan*, 326 F. 2d 490; where the Court says:

> "To make out a cause of action under the Civil Rights Statutes, the state court proceedings must have been a complete nullity, with a purpose to deprive a person of his property without due process of law. To hold otherwise would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision. The Fourteenth Amendment did not alter the basic relations between the States and the national government * * * Nor does it 'assure uniformity of decisions or immunity from merely erroneous action'."

Here it should be noted that the relief sought is inconsistent with the alleged misconduct of the persons before the Court. The petitioners demand that the construction of a large sewage disposal plant jointly financed by the Federal Government, the State and the County be enjoined and abandoned, whereas the only role of the individual Defendants lies in the fact that, under local law, they are charged with the supervision of the plant after it has been constructed and they participated administratively in the events leading up to the decision to undertake the project. No allegedly unconstitutional law or action of the State of Maryland or of the County, administrative or judicial, is identified in the complaint as required by Supreme Court Rule 40(1)(c).

SUMMARY AND CONCLUSION

In essence, the respondents have demurred to the complaint and pleaded in bar on jurisdictional grounds. Clearly the case attempted to be stated is local and lies in equity and not, as between the parties, in constitutional controversy. The County, with State and Federal approval and financial assistance, contracted to have a sewage disposal plant constructed on lands contiguous to lands of the petitioners. Its right to do so has been duly litigated through the administrative and judicial processes of the State of Maryland. Petitioners, having abandoned that contest after a series of unfavorable results, now seek to attack the County's right to proceed with construction collaterally in Federal District Court. The springboard of this attack is the ingenious concept that the United States Constitution guarantees to every citizen maintenance of a status quo in the environment; that one who has, under color of state law, participated in an undertaking which may, prospectively, disturb that status quo, transgresses the Civil Rights Act and thus through the individual agent, the principal may be enjoined from exercising its right to complete the project proposed. Respondents submit that, regardless whether the proper defensive grounds be failure to state a cause of action, lack of jurisdiction, res judicata, or non-joinder, the complaint below was improperly framed, and cannot be entertained. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

PHILLIP F. SCHEIBE,
County Solicitor,
JOHN M. COURT,
Assistant County Solicitor,
Attorneys for Respondents.